PP v. RAMLI SAION

HIGH COURT MALAYA, SHAH ALAM
AKHTAR TAHIR J
[CRIMINAL APPEAL NO: 41S-492-12-2011]
10 FEBRUARY 2015

CRIMINAL PROCEDURE: *Charge – Alteration or amendment of – Prosecution applied to amend charge after testimony of witness – Whether prosecution merely amended or altered charge altogether – Whether case fit for retrial or postponement – Criminal Procedure Code, ss. 158, 159 & 160*

CRIMINAL PROCEDURE: *Appeal – Appeal against acquittal – Whether prosecution's appeal had any merits – Whether victims cheated by accused – Whether victims claim against accused subjected to civil claim or criminal charge – Penal Code, s. 420*

The accused was tried for 11 charges of cheating under s. 420 of the Penal Code. The Magistrate acquitted and discharged the accused of four charges at the end of the prosecution's case and called for the defence of the remaining seven charges. On the direction of the Chief Registrar, the defence of the seven charges was heard by another Magistrate who also acquitted and discharged the accused. Dissatisfied, the prosecution appealed. In considering the appeal, the High Court Judge noticed that the charges appended on the charge sheet were different from the sample charge quoted by the Magistrate in his grounds of judgment. On further perusal of the record of appeal, it was found that after the 11th witness had testified, the prosecution had applied to amend the charge. Hence, the new charges as mentioned by the Magistrate in his grounds of judgment. The issues before the court were (i) whether the prosecution was merely amending the charge or had altered the charge altogether; and (ii) whether the prosecution's appeal had any merits.

Held (dismissing appeal; affirming decision of the Magistrate Court):

(1) A reading of both the original and the new charge showed that there was nothing similar between both the charges. Everything from the date, the place and more importantly the manner of deception was totally different. The new charges were not amendments but alterations. As the charges were altered materially, the provisions of law under ss. 158 to 160 of the Criminal Procedure Code ('CPC') applied. Looking at the extent of alteration, the case was fit to be retried under s. 160 of the CPC or in the alternative, for a reasonable amount of postponement to be given to the defence with a right to recall all witnesses in line with s. 159 of the CPC. The manner in which the Magistrate had hurried the trial after such material alterations clearly prejudiced the accused. (paras 7, 8, 10 & 11)

(2) The deception carried out by the accused was to convince the victims of an investment scheme which could give healthy returns when the accused actually knew no such investment existed. The prosecution sought to prove the certificates issued by the accused were false and the company who was said to be doing the investments had no knowledge of the certificates issued by the accused. However, evidence showed that the victims were not misled by the false investment certificates and had invested based on personal representations made by the accused and continued to invest when they received returns as promised for a few months. Their grievances only arose when their dividend payments were stopped. This could be a subject for a civil claim but certainly not a reason for a criminal charge against the accused. Therefore, the appeal by the prosecution against the acquittal and discharge of the accused was without merits. (paras 13-15 & 17-19)

Legislation referred to:
Criminal Procedure Code, ss. 158, 159, 160
Penal Code, s. 420

For the prosecution - Iswa Tonie; DPP
For the accused - CV Devan; M/s CV Devan & Co

Reported by Lyana Shohaimay

JUDGMENT

Akhtar Tahir J:

[1] The accused in this case was tried for 11 charges of cheating under s. 420 of the Penal Code before Magistrate Pn Jamilah bt Jamil. The Magistrate acquitted and discharged the accused of four charges at the end of the prosecution's case and called for the defence of the remaining seven charges.

[2] The defence of the seven charges on the direction of the Chief Registrar was heard by another Magistrate who acquitted and discharged the accused of all the seven charges after hearing the defence. This is the subject matter of the present appeal.

[3] The first matter which attracted my attention when considering this appeal was that the learned Magistrate had carefully noted down in his grounds of judgement the case numbers of the cases before him and then appended one charge as a sample for the other six charges which only differed in terms of the complainant or victim.

[4] The sample charge read as follows:

> Bahawa kamu pada 27.4.2004 bertempat di LOBI HOTEL QUALITY, SHAH ALAM di dalam Daerah Petaling Jaya, di dalam Negeri Selangor telah menipu NOR AZLINDAH BT MD ZAM @ MD LAZAM (NO K/P 700220-04-5348) dengan memperdaya beliau untuk membuat satu

pelaburan yang kamu mengetahui tidak wujud dengan demikian kamu dengan curangnya mendorong NOR AZLINDAH BT MD ZAM @ MD LAZAM (NO K/P 700220-04-5348) supaya menyerahkan kepada kamu wang tunai sebanyak RM50,000. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 Kanun Keseksaan,

[5] On perusing the record of appeal however I noticed that the charges appended on the charge sheet bearing the same case numbers were markedly different. One of the sample charges which reflect all the other charges as well was as follows:

Bahawa kamu bersama-sama pada 01.01.04 bertempat di No.30, Jalan Nujum U2/7 TTDI Jaya, Shah Alam, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan dan untuk mencapai niat bersama didapati telah menipu Nor Azlindah Binti Mohd Lazam K/P: 700220-04-5348 dengan memperdaya beliau untuk mempercayai bahawa salinan sijil-sijil saham adalah sah dan dengan demikian kamu dengan curangnya mendorong Nor Azlindah Binti Mohd Lazam K/P: 700220-04-5348 supaya menyerahkan kepada kamu wang tunai sebanyak RM30,000.00. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 420 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[6] The mystery of these two sets of different charges was unravelled on perusing further the record of appeal from the notes of evidence. From the notes it transpired that after the 11th witness had testified the prosecution had applied to amend the charge and hence the new charges as mentioned by the learned Magistrate in his grounds.

[7] The pertinent question here is whether the prosecution was merely amending the charge or altering the charge altogether. A reading of both the original and the new charge will at once answer this question as from reading the charges there is nothing similar between both the charges. Everything from the date, the place and more importantly the manner of deception is totally different. In my mind the new charges were not amendments but alteration.

[8] As the charges were altered materially the provisions of law that applied were ss. 158 to 160 of the Criminal Procedure Code. The effects of these provisions are best understood if stated in full and are as follows:

Court may alter or add to charge

158. (1) Any Court may alter or add to any charge at any time before judgement is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

When trial may proceed immediately after alteration or addition

159. If a charge is framed or alteration or addition made under either section 157 or 158, the Court shall immediately call upon the accused to plead thereto and to state whether he is ready to be tried on the charge or altered or added charge. If the accused declares that he is not ready, the Court shall duly consider the reasons he may give and if proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after the charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered or added charge had been the original charge.

When new trial may be directed or trial suspended

160. If the new or altered or added charge is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

[9] In this case the defence counsel quite rightly asked for an adjournment to further discuss the new charges with his client. However the defence application for adjournment was faced with serious objections from the prosecution. In light of this objections and the court's reluctance in giving an adjournment, the defence counsel wanted to discharge himself for which he was reprimanded by the learned Magistrate. The learned Magistrate finally reluctantly allowed for an adjournment only until the next morning.

[10] To me looking at the extent of alteration, this case was fit to be re-tried under s. 160 of the Criminal Procedure Code. In the alternative a reasonable period of postponement should have been given to the defence with a right to recall all witnesses in line with s. 159 of the Criminal Procedure Code.

[11] The manner in which the learned Magistrate had hurried the trial after such material alteration clearly prejudiced the accused.

[12] Be that as it may, the accused was finally vindicated when he was acquitted after his defence was called. For the sake of completeness it is necessary to consider the reasons of his acquittal as expounded by the learned Magistrate.

[13] Looking at the altered charges it could be noted that the deception carried out by the accused as mentioned in the charges was to convince the victims of an investment scheme which could give healthy returns when the accused actually knew no such investment existed.

[14] To prove no such investment existed to the knowledge of the accused, the prosecution had sought to prove that the certificates issued by the accused to the investors were false and the company who was said to be doing the investment had no knowledge of the certificates issued by the accused.

[15] However on looking at the testimony of the victims none of them testified that they were misled by the false investment certificate. All of them had in fact invested based on the personal representations made by the

accused. The victims had further verified the facts of the investment from family and friends and even from the employees of the investing company before investing. The evidence further showed that the investors continued to invest after the investors had received returns as promised for a number of months.

[16] A most crucial witness for the prosecution was SP13 who was roped in to join the Investor Company TMC by the accused. This witness instead of supporting the prosecution case affirmed that the accused did carry out businesses to pay dividends to the investors. The types of business included prawn farming and petrol pumps. For the prosecution to argue that no investment existed was therefore not supported by the evidence of its own witness.

[17] If the totality of the evidence of the investors is to be taken their grievances only arose when their dividend payments were stopped. The reason for this was not really explained and could most likely be due to the failure of the business carried out by the accused. This could be a subject for a civil claim but not certainly a reason for a criminal charge against the accused.

[18] A similar sentiment was shown by the learned Magistrate in acquitting the accused when he stated in his grounds of judgment as follows:

> Dapatan Mahkamah
>
> Adalah jelas dan tidak dinafikan oleh pihak pendakwaan sijil yang dikatakan untuk melabur sememangnya ada dan juga tidak dinafikan oleh pihak pendakwaan bahawa mereka yang dikatakan telah melabur wang di dalam syarikat TMC telah mendapat pulangan sepertimana yang telah dijanjikan. Jadi di manakah ketidakwujudan pelaburan yang dikatakan di dalam pertuduhan apabila:
>
> (a) Pelabur memberikan wang kepada Syarikat TMC
>
> (b) TMC memberikan skrip yang menunjukkan jumlah pelaburan
>
> (c) Pelabur menerima pulangan sepertimana yang telah dijanjikan
>
> Mahkamah ini berpendapat sekiranya adapun keingkaran di pihak Syarikat TMC adalah apabila gagal membayar pulangan 5% pada beberapa bulan dan seterusnya gagal untuk memulangkan kembali wang yang telah dilaburkan oleh pelabur-pelabur. Tetapi keadaan ini timbul selepas Syarikat TMC berjaya membayar pulangan 5% pada awal-awal pelaburan.
>
> Mahkamah ini melihat kes ini ke atas OKT adalah lebih kepada kes sivil daripada kes jenayah.

[19] In the upshot I decided the appeal by the prosecution was without merits and I therefore upheld the decision of the learned Magistrate in acquitting and discharging the accused.